STATEMENT

of

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before the

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Re: Strengthening the Ownership of Private Property Act of 2005

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and the director of Cato's Center for Constitutional Studies. I thank you, Mr. Chairman, for inviting me to testify today on the Supreme Court's recent decision in the case of *Kelo v. City of New London*[1] and to offer members of the committee my thoughts on H.R. 3405, the Strengthening the Ownership of Private Property Act of 2005 (STOPP).

I. Introduction

Let me say at the start that I'm delighted, but not surprised, that both houses of Congress as well as state legislatures across the country have responded to the Supreme Court's *Kelo* decision as they have. The public outcry against the decision has been loud and sustained—and rightly so.[2] For the Court, in effect, removed what little remained of the "public use" limitation on government's eminent domain power, its power to take private property for "public use" provided just compensation is paid to the owner. As a result, except where states limit their own power through state law, federal, state, and local governments are free today to take property from one private party and transfer title to another for virtually any reason they wish. Not surprisingly, it is usually the poor and powerless who are at greatest risk of losing their homes or businesses under this regime, while the well-connected profit handsomely by obtaining title to property "on the cheap." Exploiting those connections, they ask government officials to exercise their "despotic

[1] 125 S. Ct. 2655 (2005).
[2] See, e.g., "Missouri Condemnation No Longer So Imminent: Supreme Court Ruling Ignites Political Backlash," Washington Post, Sept. 6, 2005, at A2.

power," as eminent domain was known in the 17th and 18th centuries,[3] so that they might be spared from having to offer prices a willing seller might accept. It is a rank abuse of that power, and the Court's complicity in the abuse makes it only worse.

People are turning to their legislatures, therefore, including to the United States Congress. Since the purpose of these hearings is twofold—to review the *Kelo* decision and to consider whether and how the STOPP Act addresses the problems raised by it—I will discuss both, at least in summary form.[4] I should note here, however, that the problem rests rather more with the Court than with the political branches, although it starts with those branches. Had the Court done its job over the years, that is, these hearings would not be necessary. And let me be clear about that. This is not exactly a case of "judicial activism," at least as that term is often used today, although it is "activism" of a kind. What we have here, rather, is political bodies exercising eminent domain and the courts failing to police their use of that power to ensure that it is exercised consistent with the limits imposed by the Fifth Amendment's Takings Clause.

Thus, although the problem begins with the political branches, it is the failure of judicial review—the Court's "restraint," if you will, its *deference* to those branches—that brings us together here. That deference amounts to "activism" insofar as the term refers to judges failing to apply the law: whether that failure arises because they are too active or too passive, it comes to the same thing—they are not doing their job. It is not a little ironic, however, that people are turning to their legislatures to address this problem since the problem could be addressed quite simply by the political branches themselves, merely by restraining their own power in the first place. Thus, the STOPP Act might usefully be recast to legislatures, including this one, as follows: Stop abusing eminent domain in the first place; then we wouldn't need to turn to the courts.

But as the Founders understood, it is in the nature of political power that it will inevitably be abused, which is why they provided for an independent judiciary—to check that power.[5] The courts have failed in that, however, so H.R. 3405 has been proposed. To see whether it will address the problem, let me first review very briefly the principles of the matter, distinguishing the regulatory takings issue, which is not before the committee today, from eminent domain in its fuller sense, which is before us. I will then look even more briefly at how the Court has failed to police abuses in both of those areas.

II. The Court and Eminent Domain

There are two great powers that belong to government, the police power and the power of eminent domain. As the Declaration of Independence says, the reason we create government in the first instance is to secure our rights. That's what the police power is all

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[3] "The despotic power, as it is aptly called by some writers, of taking private property, when state necessity requires …." Vanhorne's Lessee v. Dorrance, 2 U.S. 304 (Dall.) (C.C. Pa. 1795).

[4] I have discussed these issues more fully in "Property Rights and Regulatory Takings," Cato Handbook on Policy, chap. 22 (2005); and Roger Pilon, Property Rights, Takings, and a Free Society, 6 Harv. J.L. & Pub. Pol'y. 165 (1983).

[5] For a thorough recent treatment of that subject, see Saikrishna B. Prakash and John Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003); available at http://ssrn.com/abstract=426860.

about: it's what John Locke called the "Executive Power" that each of us enjoys in the state of nature,[6] which we yield up to government to exercise on our behalf once we leave that state, enter civil society, and create government. Although the Executive Power, now the police power, is nowhere mentioned in the Constitution, implicit in the document's structure and in the Tenth Amendment in particular is the idea that we left that power with the states, delegating to the federal government only certain enumerated powers—to tax, to borrow, to regulate interstate commerce, and so forth.

Like the police power, the eminent domain power too is nowhere found in the Constitution. It is said to be an "inherent" power of government, yet unlike the police power, no one enjoys the power of eminent domain in the state of nature and hence no one has it to yield up to government when government is created. Indeed, there could hardly be any such inherent power in the state of nature, for it is a power to take what belongs to another, albeit with just compensation, but against his will and hence in violation of his inherent right to be left alone in his life, liberty, and property.[7] For that reason it was known as the "despotic power." Thus, unlike the police power, the eminent domain power is inherently illegitimate.

Such legitimacy as the power enjoys stems, therefore, from two sources. First, although none of us had the eminent domain power to yield up to government, we agreed all the same, through the social contract we drafted in the original position (the Constitution), to let government exercise that power so that it might provide us with "public goods" at a reasonable cost. Yet even then the power was recognized only implicitly, in the Fifth Amendment, in connection with the explicit limits on its exercise that are set forth in the Takings Clause: "nor shall private property be taken for public use without just compensation." By implication, government may take private property, but only for a public purpose, and only with just compensation. (Note too that eminent domain is merely an instrumental power, exercised in service of some other power—the power to build roads, forts, schools, and the like.) Second, as a practical matter, the power exists to enable public projects to go forward without being held hostage to holdouts seeking to exploit the situation by extracting far more than just compensation. When properly used, therefore, eminent domain protects the individual from being exploited for the public good, but it protects the public from being exploited as well.

Thus, the best that can be said for eminent domain is this: the power was ratified by those who were in the original position, the founding generation; and it is ''Pareto superior,'' as economists say, which means that at least one party (the public) is made better off by its use while no one is made worse off—provided the owner does indeed receive just compensation. In virtue of its inherent illegitimacy, however, there must be a strong presumption against its use. Thus, if property can be acquired through voluntary means, our principles as a nation urge us to take that course. Only if necessary should governments resort to this despotic power.

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[6] John Locke, Two Treatises of Government, The Second Treatise of Government ¶ 13 (Peter Laslett ed., 1965) (1690).

[7] As the old common law judges understood, all rights can be reduced to property. Locke put it simply: "Lives, Liberties and Estates, which I call by the general Name, *Property*." Id. at ¶ 123.

Here, then, is how the police power and the power of eminent domain are related. First, when government acts to secure rights—when it stops someone from polluting on his neighbor or on the public, for example—it is acting under its police power, not its power of eminent domain, and the owner thus regulated is entitled to no compensation, whatever his financial losses, because the use prohibited or ''taken'' was wrong to begin with. Since there is no right to pollute, we do not have to pay polluters not to pollute. Thus, the question is not whether value was taken by a regulation but whether a *right* was taken. Proper uses of the police power take no rights. To the contrary, they protect rights.

Second, when government acts not to secure rights but to provide the public with some good—wildlife habitat, for example, or a lovely view, or historic preservation—and in doing so prohibits or ''takes'' some otherwise *legitimate* use, then it is acting, in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer. The principle here is quite simple: the public has to pay for the goods it wants, just like any private person would have to. Bad enough that the public can take what it wants by condemnation; at least it should pay rather than ask the owner to bear the full cost of its appetite. This is your classic regulatory takings case, of course: the government takes uses, thereby reducing the value of the property, sometimes drastically, but refuses to pay the owner for his losses because the title, reduced in value, remains with the owner. Such abuses today are rampant as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, ''off budget.'' There is an old-fashioned word for that practice: it is ''theft,'' and no amount of rationalization about ''good reasons'' will change the practice's essential character. Even thieves, after all, have ''good reasons'' for what they do.

Third, when government acts to provide the public with some good and that act results in financial loss to an owner but takes no right of the owner, no compensation is due because nothing the owner holds free and clear is taken. If the government closes a military base, for example, and neighboring property values decline as a result, no compensation is due those owners because the government's action took nothing they owned. They own their property and all the uses that go with it that are consistent with their neighbors' equal rights. They do not own the value in their property.

Finally, we come not to takings of illegitimate uses, requiring no compensation, nor to takings of legitimate uses, requiring compensation, nor to takings of mere value, requiring no compensation, but to takings in the full sense—takings of the entire estate. Here, compensation is not the issue—although *just* compensation often is an issue, for rarely does an owner receive the full value of his losses. Setting that problem aside, the main question here, as in the *Kelo* case, is whether the taking is for a "public use." That the term does not enjoy a precise definition does not mean that it cannot be defined at all, of course, yet that is the implication, in effect, of *Kelo*. The Court stripped the term of its very purpose—to limit condemnations to those that are for a public use. It read that limit on power out of the Constitution, leaving every owner in America exposed.

In the amicus brief the Cato Institute filed in *Kelo*, written by the University of Chicago's Richard Epstein, one of the nation's preeminent experts on property rights law,

we distinguished four categories of "public use" that can be found in the case law.[8] The first is straightforward and unproblematic: when government condemns private property and takes title itself for some public use like a public road, park, military facility, or the like, we have a clear public use. The second category is ordinarily unobjectionable as well: this involves condemnations and transfers of title from one private party to another, whether undertaken by government or by the party under government authorization, when the subsequent use will be available to the public at large. Common carriers like railroads, utilities, and network industries, facing holdout and assembly problems, come to mind here. As Cato's brief states:

> It would be a major mistake to insist that all railroads, canals, and utilities be publicly owned in order to invoke the state's eminent domain power to overcome the holdout problems that block the formation of a unified network. Why risk inefficient operations when a better system is available—namely, private operation, where the property taken is open to the public at large on a reasonable and nondiscriminatory basis?[9]

There are a few other odd cases as well in which the "public use" limit might be satisfied. These involve situations in which the use of eminent domain promises large social gains without disadvantaging the individuals who are thus forced to surrender their property for the public good. Professor Epstein cites certain older grist mill and mining cases that satisfy this narrow extension of the public use limit. But in general, it is use by the public, often accompanied by regulated rates-of-return, that justifies the use of eminent domain for such private-to-private transfers.

The third and fourth categories, however, stretch "public use" beyond recognition. The blight cases, for example, often involve labeling whole neighborhoods as "blighted," thereby enabling government to condemn the properties and transfer titles to others—large developers, ordinarily—all under the guise of "urban renewal." As our brief notes, these cases often involve the court's conflating the police power and the eminent domain power:

> But while the police power would allow the state to enjoin the nuisance, without compensation, it would *not* allow it to take title to the property once the nuisance had been eliminated. Thus, the police power is at once stronger than the eminent domain power (in that it proceeds without compensation) and weaker (in that it does not justify taking title and transferring the property to another private owner for private use).[10]

These blight cases tend also to substitute "public benefit" for "public use," which opens the door for much greater scope for eminent domain.

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[8] Brief of the Cato Institute as amicus curiae in support of petitioner, Kelo v. City of New London, 125 S. Ct. 2655 (2005)(no. 04-1080); available at http://www.cato.org/pubs/legalbriefs/kelovcityofnewlondon.pdf.
[9] Id. at 13.
[10] Id. at 17-18.

That substitution is most evident, however, in the fourth category, which involves the use of eminent domain to promote "economic development." Here again we often find states and municipalities condemning whole neighborhoods. The infamous *Poletown* case of 1981 is Exhibit A of this rationale for eminent domain.[11] That case arose after the City of Detroit condemned the homes and small businesses of some 4,200 people to make way for a Cadillac plant—all to promote jobs, a greater tax base, and other economic benefits that in fact never did live up to expectations. Fortunately, the Michigan Supreme Court overturned that decision just last year, but it remains the textbook example of what is wrong with economic development condemnations. To be sure, such condemnations *may* generate "public benefits," although the evidence very often suggests a net loss. From a consideration of constitutional principle, however, the main problem is not with the difficulty of calculating benefits and losses, but with the Supreme Court's refusal, as in *Kelo*, to read "public use" as a serious limit on the power of eminent domain. If the Framers had wanted that power to be used to generate "public benefits," they could have written it in a way that would have enabled that. They didn't. "Public use" was employed to *limit* power, not to facilitate it.

As this brief outline of the issues suggests, the Court has failed, especially over the course of the 20th century, to develop anything like a well-worked-out theory of property rights of a kind the Framers had in mind. In the area of regulatory takings, we have had what Justice Antonin Scalia in 1992 called 70-odd years of "essentially ad-hoc" jurisprudence, even as he was adding yet another year to the string.[12] Thus, owners today can get compensation when title is actually taken, as in the outright condemnations just discussed; when their property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions that are unreasonable or disproportionate when it grants a permit to use property. Even if that final category of takings were clear, however, those categories would not constitute anything like a comprehensive theory of the matter, much less a comprehensive solution to the problem of regulatory takings. In particular, in the overwhelming number of cases, regulations take perfectly legitimate uses, thus substantially reducing the value of the property, but the owner must bear that loss entirely, while the public benefits from the "free goods" thus produced. Again, this issue is beyond the scope of today's hearings, but it is one the committee should put on its agenda if it is serious about "strengthening the ownership of private property."

Turning to the kinds of eminent domain cases that are before the committee, here too, as the above analysis suggests, the Court has made a mess of things by essentially eviscerating the public use restraint on the exercise of eminent domain. To rectify that problem, however, there is just so much that Congress or state legislatures can do since a court, in any case involving federal law, will be applying the Supreme Court's current "public use" standard, which is essentially vacuous, to the facts of the case before it. Still,

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[11] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), overruled County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). For a fuller discussion, see Ilya Somin, Robin Hood in Reverse: The Case against Economic Development Takings, Cato Policy Analysis No. 535, Feb. 22, 2005.
[12] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

Congress and state legislatures, although unable to change the Court's errant reading of the Constitution, can address the problem most fundamentally by simply not authorizing or underwriting exercises of eminent domain that are not for a genuine public use. More than anything else, that alone would go far toward correcting the problem of judicial indifference to constitutional limits and judicial deference to the political branches. Let us see whether H.R. 3405 takes that tack.

III. H.R. 3405

As I read the STOPP Act, it moves in just that direction. It's aim, that is, is to cut off federal funding for programs run by state and local governments that use "the power of eminent domain to obtain property for private commercial development or that fail[] to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes." Section 2(a) of the Act provides that federal financial assistance under any federal economic development program "may not be provided" to any state or local government that engages in any of the acts described in Section 2(b). Those acts are (1) transferring property by eminent domain from one private owner to another "for any economic development purpose"; and (2) failing to provide relocation assistance that is equivalent to that provided under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act of 1970 "to any person displaced by the use of the power of eminent domain for any economic development purpose." Section 2(c) provides for state or local officials to give notice of compliance to heads of federal agencies. Section 3 defines "federal economic development program" and lists such programs; it also defines "federal financial assistance," "state," and "unit of local government." Section 4, "Applicability," has yet to be drafted, I understand.

The first thing to be noticed about this bill is that it is addressed to state and local abuses of eminent domain. Although that is where most eminent domain abuses take place, one would like to see a federal bill addressing federal abuses as well. In other words, Congress should clean its own house first, insofar as it needs doing.

Second, there is a certain lack of clarity in this bill concerning just whom it is addressing. The bill purports to limit federal funding for abusive state and local projects. One would expect it to be addressed, therefore, to those federal agency heads charged with administering such federal programs, directing them not to fund abusive projects. Sections 2(a) and (b), however, constitute general descriptions of the bill. Only in Section 2(c), "Certification of Compliance," are officials referenced, and obliquely at that. Rather than directing federal officials—e.g., "Heads of federal agencies shall not disburse federal funds until heads of state and local programs certify . . ."—this Section begins with a case in which the federal head does not have actual knowledge of a violation, then places the burden on the *state* official to notify the federal official that he is *not* engaged in an abusive act, and so forth. This Section needs to be substantially redrafted.

Third, the "may not be provided" language of Section 2(a) is ambiguous. The more natural reading is "shall not be provided," but a weaker, discretionary reading of "may" is possible as well. Replace "may" with "shall."

Fourth, it is unclear what Section (2)(b)(2) adds to Section (2)(b)(1). If funds will be withheld when states use eminent domain for private-to-private transfers "for any economic development purpose," ((2)(b)(1)), why threaten to withhold funds if states fail to provide relocation assistance after using eminent domain for private-to-private transfers "for any economic development purpose" ((2)(b)(2))? Won't (2)(b)(1) do the job? Isn't it sufficient?

Fifth, and now I move to more serious concerns, "for any economic development purpose" is the operative language in this bill, but what does it mean or include? Would states be penalized if they used eminent domain for network industries as discussed under category two above? At the very least, this crucial term needs to be fully defined in light of the analysis sketched above.

Sixth, I would note a glaring irony in this bill. It seeks to restore constitutional guarantees by restricting federal funding of state programs, funding that, under a proper reading of the Constitution's doctrine of enumerated powers, is unauthorized to begin with. Most of the programs listed in Section 3(1) are beyond the authority of Congress to enact and hence are unconstitutional.[13] But that is the subject for another day.

Finally, in this same vein, a question arises as to the authority of Congress to enact this bill. The modern view is that Congress finds its authority under the so-called General Welfare Clause or the so-called Spending Clause, neither of which exists, but both of which are said to be found at Article I, Section 8, Clause 1 of the Constitution, which in truth is the Taxing Clause. That clause authorizes Congress to tax, just as the next clause authorizes Congress to borrow. Appropriations and spending, which are different, must be carried out under the Necessary and Proper Clause. Thus, properly read, Congress has no authority to spend "for the general welfare," yet that is the modern reading under which this bill proceeds.[14]

And that brings us to *South Dakota v. Dole*[15] and to the question of whether Congress may restrict states as this bill proposes to do. I believe *Dole* was wrongly decided, but given that decision, I see nothing in the opinion that would restrict Congress from conditioning states' receipt of federal funding on their refraining from exercising a power the Supreme Court claims they have, namely, to condemn private property for economic development purposes. But the legal morass here is so tangled that it is not likely to be untangled in these hearings, so I will say nothing further about it.

Nevertheless, this bill needs more work if it to accomplish the worthy ends it has in view.

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[13] For a trenchant discussion of this issue, see this aptly titled book, written by a Harvard Law professor in 1932, just before the birth of the modern American welfare state: Charles Warren, Congress as Santa Claus (1932).

[14] See id. See also Gary Lawson and Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke Law Journal 267 (1993); Spending Clause Symposium, 4 Chapman Law Review (2001).

[15] 483 U.S. 203 (1987).